

EXHIBIT C

1 Yitai Hu (SBN 248085) (yhu@akingump.com)
Sean P. DeBruine (SBN 168071) (sdebruine@akingump.com)
2 Ming-Tao Yang (SBN 221295)(myang@akingump.com)
Hsin-Yi Cindy Feng (SBN 215152) (cfeng@akingump.com)
3 AKIN GUMP STRAUSS HAUER & FELD LLP
Two Palo Alto Square
4 3000 El Camino Real, Suite 400
Palo Alto, California 94306-2112
5 Telephone: 650-838-2000
Facsimile: 650-838-2001

6 Attorneys for Plaintiff and Counterdefendant
7 ELANTECH DEVICES CORPORATION

8 UNITED STATES DISTRICT COURT
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10 NORTHERN DISTRICT OF CALIFORNIA
11
12 SAN FRANCISCO DIVISION

12 ELANTECH DEVICES CORP.,

13 Plaintiff,

14 vs.

15 SYNAPTICS, INC. and AVERATEC, INC.,

16 Defendants.

Case No. 3:06-CV-01839 CRB

**ELANTECH DEVICES CORP.'S REPLY
MEMORANDUM IN SUPPORT OF ITS
MOTION FOR PARTIAL SUMMARY
JUDGMENT OF INFRINGEMENT OF
THE '352 PATENT**

Date: January 11, 2008
Time: 10:00 a.m.
Courtroom 8, 19th Floor
Judge: Hon. Charles R. Breyer

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21 **REDACTED**
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1 In its three previous briefs on the topic of its infringement of Elantech's '352 patent, Synaptics
2 has had more than ample opportunity to raise all relevant arguments. After that extensive briefing and a
3 comprehensive oral argument, this Court has already determined that Synaptics' Type 2 Enabled
4 products infringe. Now, in opposing Elantech's present motion for partial summary judgment to confirm
5 that finding and avoid unnecessary additional litigation, Synaptics attempts to re-argue issues that have
6 already been raised, fully briefed, and previously decided by this Court. In particular, Synaptics again
7 argues: (1) that Elantech failed to compare structures as required by 35 U.S.C. § 112, para. 6 for the
8 "providing an indication" limitation; and (2) that the Type 2 enabled code does not identify the lowest
9 value in the finger profile. Knowing that these arguments have no merit, Synaptics now introduces for
10 the first time new arguments, asserting: (3) that Elantech has not accused any Type 2 enabled products;
11 and (4) that Elantech presents no evidence of infringement in the United States. These new arguments
12 also lack merit, are based on prejudice caused by Synaptics' failure to provide discovery, and are
13 contrary to representations made by Synaptics relating to various agreements between the parties.
14 Because none of Synaptics' arguments (old or new) has any merit, Elantech's motion should be granted.
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16 I. FACTUAL AND PROCEDURAL BACKGROUND

17 On April 20, 2007, Synaptics file a motion for summary judgment of noninfringement of the
18 '352 patent. That motion sought, *inter alia*, judgment that its "touchpads including Type 2 code" do not
19 infringe. Synaptics did not limit its motion to only its TM41 series products. Similarly, in opposing
20 Elantech's May 25, 2007 Motion for Summary Judgment [Dkt. No. 126], Synaptics did not argue that
21 Elantech had not specifically accused any "Type 2" products. Ruling on the parties' motions, the Court
22 determined that contested issues of fact precluded a summary finding of infringement as to Synaptics'
23 Type 2 products in which finger counting is not enabled, but determined that such products with finger
24 counting enabled did meet every limitation of claim 18 of the '352 patent.

25 Despite having itself placed all of its products including the Type 2 firmware at issue in its own
26 motion, Synaptics now attempts to avoid judgment based upon Elantech's Final Infringement
27 Contentions ("FICs"). However, Synaptics fails to mention that it was its own failure to provide
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1 adequate discovery that caused Elantech to so limit its FICs and, more importantly, that Synaptics
2 counsel long ago agreed that Elantech could amend the FICs to cover the Type 2 products.

3 On July 21, 2006, Elantech served its First Set of Document Requests, seeking, *inter alia*,
4 exemplary Synaptics products and “Documents concerning or relating to the structure, function, or
5 operation of Synaptics Product(s), including, but not limited to the related specification, data sheets,
6 drawings, diagrams, circuits, schematics, notebooks, protect reports, workbooks, lab books, notes, code
7 . . .” See Declaration of Sean P. DeBruine (“DeBruine Decl.”), at ¶ 2; Exh. A (Request No. 30).
8 “Synaptics Products” was defined to include “any touch pad product made by or on behalf of Synaptics
9 and/or sold by or on behalf of Synaptics, and any parts . . . for such product.” See *id.* Hence, Elantech’s
10 First of RFPs was not limited to the “TM41” series.

11 Accompanying the responses, Synaptics produced only two chips, both marked with the “TM41”
12 series for product number. See DeBruine Decl., at ¶ 3; Exh. B (transmittal letter enclosing the two
13 chips). Consistently, Synaptics’ website reveals only the TM41 series. See DeBruine Decl. at ¶ 4. This
14 website discloses only a single reference to a “Touchpad Interfacing Guide,” which in turn does not
15 identify any products other than the TM41 number series. See *id.*; Exh. C (Synaptics Touchpad
16 Interfacing Guide). Thus, Elantech was lead to believe that the only relevant Synaptics’ touchpad
17 products consisted of the “TM41” series.

18 None of the documents or things produced by Synaptics in response to Elantech’s document
19 requests or as required by Fed. R. Civ. P. 26 or Pat. L. R. 4 revealed any product numbers other than
20 those starting with “TM41.” See DeBruine Decl., at ¶ 5. Unaware of any other applicable Synaptics
21 touchpad products, Elantech submitted its Preliminary Infringement Contentions, identifying the
22 “TM41” series of products. See DeBruine Decl., at ¶ 5; Exh. D (Elantech’s Preliminary Infringement
23 Contentions, dated September 1, 2006).

24 In October of 2006, counsel for Elantech and Synaptics discussed a mutual exchange of
25 exemplary code that would readily demonstrate how the parties’ respective touchpads operated. See
26 DeBruine Decl., at ¶ 6; Exh. E (e-mail dated October 2, 2006 from K. Kramer to S. DeBruine). Elantech
27 produced its source code in searchable format with listing files. See DeBruine Decl., at ¶ 7. According
28 to Synaptics’ counsel, in that same time frame, “Synaptics produced current and exemplary versions of

1 Synaptics' proprietary firmware and source code (the 'Code') governing the operation of the Synaptics'
2 touchpad devices." See Declaration of Karl J. Kramer, filed on April 20, 2007 ("Kramer Decl."), at ¶10;
3 see also Memorandum of Points and Authorities in Support of Synaptics' Motion for Summary
4 Judgment of Noninfringement of the Asserted Claims of the '352 Patent, filed on April 20, 2007
5 ("Synaptics' MSJ Brief"), at 3:23-24 ("By agreement, the parties exchanged documents and exemplary
6 code, detailing the operations of the Accused Touchpads"). A search of the Code did not reveal any
7 other product names other than the TM41 series. See DeBruine Decl., at ¶ 7.

8 On April 19, 2007, Elantech's counsel sent an informal notice of deposition of Synaptics under
9 Federal Rules of Civil Procedure Rule 30(b)(6). See DeBruine Decl., at ¶ 8; Exh. F (email dated April
10 19, 2007 from S. DeBruine to K. Kramer attaching Notice of Deposition of Synaptics under Federal
11 Rule of Civil Procedure 30(b)(6)). The Notice of Deposition sought the identification and scheduling of
12 designated witness(es) who would be testifying on behalf of Synaptics. See *id.* Rather than produce the
13 requested discovery, Synaptics filed its motion for summary judgment of non-infringement. After a
14 month passed with no response, on May 25, 2007, Elantech formally served a Notice of Deposition. See
15 DeBruine Decl., at ¶ 9; Exh. G (email dated May 25, 2006, attaching cover letter and Notice of
16 Deposition). Instead of agreeing to designate and produce 30(b)(6) witnesses, Synaptics offered only to
17 produce David Gillespie on June 4, 2007, as a 30(b)(6) witness for the very limited purposes of
18 testifying on Synaptics' behalf on subject matter relating to the parties' pending motions for summary
19 judgment. See DeBruine Decl., at ¶ 9; Exh. H (letter dated June 1, 2007 from K. Kramer to S.
20 DeBruine).

21 Synaptics motion was not limited to the products identified in Elantech's FICs, but rather to all
22 products based on the contention that the source code underlying their operation, *i.e.*, the purported
23 "Type 1 Code" (or "exemplary" version) and "Type 2 Code" (or "current" version) purportedly do not
24 meet the claim elements of the '352 Patent. See Synaptics' MSJ Brief, at 3:14-7:23. On May 7, 2007,
25 within thirty days of service of the Court's Claims Construction Order, Elantech served its Final
26 Infringement Contentions. See DeBruine Decl. at ¶ 10, Exh. I (Elantech's Final Infringement
27 Contentions). On June 4, 2007, Elantech was shocked to learn that the TM41 series, is apparently an
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1 older series of products,¹ and that Synaptics manufactured more current products, namely “TM51,”
 2 “TM61,” “TM62” and possibly a “TM71” series of touchpads (the “Additional Touchpad Products”),
 3 which correspond to the Type 2 Code (or “current” version of the Code). *See* DeBruine Decl., at ¶ 11;
 4 Exh. J (Transcript from the Deposition of David Gillespie [“Gillespie Depo.”], conducted on June 4,
 5 2007, at 51:11-21, 58:23-59:2, 59:12-60:13). Mr. Gillespie explained that the older TM41 series, unlike
 6 the more current products, lack sufficient memory to run Type 2 Code and hence, ran only Type 1 Code.
 7 *See id.* Based on learning this information, the very next day, Elantech sent a request to Synaptics to
 8 stipulate to allow Elantech to amend its Final Infringement Contentions to add in the Additional
 9 Touchpad Products. *See* DeBruine Decl., at ¶ 12; Exh. K (letter dated June 5, 2007 from S. DeBruine to
 10 K. Kramer). Synaptics refused. *See* DeBruine Decl., at ¶ 13; Exh. L (letter dated June 6, 2007 from E.
 11 Labit to S. DeBruine). Elantech attempted to explain why Synaptics’ refusal was unreasonable. *See*
 12 DeBruine Decl., at ¶ 14; Exh. M (letter dated June 11, 2007 from S. DeBruine to E. Labit). Synaptics
 13 did not respond. *See* DeBruine Decl., at ¶ 14.

14 On or about June 14, 2007 counsel for Elantech discussed this matter with Synaptics’ lead
 15 counsel, Karl Kramer. Mr. Kramer agreed that Synaptics would not oppose Elantech’s pending
 16 summary judgment motion to the extent it applied to products not delineated in Elantech’s FICs , and
 17 would not oppose a motion by Elantech to amend its FICs after the resolution of the summary judgment
 18 motion, to name any previously undisclosed Synaptics products that included the Type 2 code if
 19 Synaptics’ non-infringement motion were to be denied. DeBruine Decl., ¶ 14.²

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 25 ¹ Synaptics documents do not make any mention of a “Type 1 Code” or “Type 2 Code.” Rather,
 26 Synaptics’s expert, Andrew Wolfe, has adopted this terminology from Synaptics counsel to refer to the
 27 “exemplary” version of the Code as that containing “Type 1 Code” and the “current” version as that
 28 containing “Type 2 Code.” *See* Supplemental Declaration of Andrew Wolfe (“Supp. Wolfe Decl.”), filed
 on May 17, 2007, at ¶2. Type 1 Code and Type 2 Code correspond to [] files.

² Elantech has now prepared a motion for leave to amend its FICs. Elantech did not do so
 previously because of the parties’ concerted efforts to settle this matter. DeBruine Decl, ¶ 14.

1 **II. ARGUMENT**

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3 **A. The Court Has Already Determined That The “providing an indication” Limitation Is Satisfied**

4 Synaptics erroneously asserts that Elantech has not compared structures to support its burden as
5 to the claimed “means for providing an indication.” Syn. Opp. at 5:3-5. In fact, Elantech has provided
6 ample evidence to satisfy its burden. As Elantech has pointed out, the ‘352 patent clearly discloses
7 microcontroller 60 as the structure that performs the required function of “providing an indication” and
8 also discloses exemplary firmware executing on the microcontroller 60 that governs the operation of the
9 touchpad. Elantech’s Motion for SJ at 12:11-13:14. Synaptics also erroneously asserts that Elantech has
10 not identified any structure in the accused devices that is a “means for providing an indication.” Syn.
11 Opp. at 5:13-16. Synaptics characterizes Elantech’s position as asserting that the

12 [] register, or state that the data sitting in this register
13 meets the “providing an indication” claim limitation. Syn. Opp. at 5, n. 3. Rather, Elantech has only
14 asserted that this Court determined that the procedure including identification of maxima by the
15 [] routine and storage of a count of fingers in the
16 [] register satisfies the “providing an indication” claim
17 limitation. Elantech’s Motion for Partial SJ at 7:13-16. Specifically, this Court determined that
18 “[B]ecause this [] routine is capable of providing an indication of the simultaneous presence of
19 two fingers, its execution satisfies the ‘providing an indication’ claim limitation.” SJ Order at 11. In
20 other words, Elantech has restated this Court’s finding that the [] routine and the corresponding
21 firmware code satisfy this limitation and constitute a “means for providing an indication.” To the extent
22 that any additional identification of structure is required, Elantech has identified a microcontroller
23 executing firmware including various software routines based on software code. Thus, Synaptics’
24 repeated assertion of this argument on this point still lacks merit.

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26 **B. The Court Has Already Determined That The Type 2 Enabled Code Identifies The Lowest Value In The Finger Profile**

1 Synaptics attempts to re-argue that the Type 2 enabled code does not infringe because it does not
2 “identify the lowest value in the finger profile” as required by the Court’s April 6, 2007 Claim
3 Construction Order. Synaptics has attempted to argue this point previously, but this Court has already
4 determined that “[t]he asserted claims do not require an ‘analysis’ or ‘indication’ of the minima or
5 lowest value; the claims only require that the minima or lowest value is ‘identified,’ and **Type 2 Code**
6 **identifies a minimum or lowest value at the ‘10’ transitions.**” SJ Order at 14:23-26 (emphasis
7 added). Thus, Synaptics’ argument on this point has been fully considered and requited by this Court..
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9 **C. Synaptics’ Argument That Elantech Has Not Identified Type 2 Enabled Products Is**
10 **Contrary To Synaptics’ Agreement Not To Oppose Amended Final Infringement**
11 **Contentions**

12 Synaptics’ argument that Elantech has not identified Type 2 Enabled products is contrary to its
13 recognition that products including the Type 2 code are at issue in the case, and its agreement not to
14 oppose Elantech’s amended Final Infringement Contention naming those products. After filing its
15 Motion for Summary Judgment of Infringement [Dkt. No. 126], at and during the deposition of
16 Synaptics, Inc. (“Synaptics”), Elantech first learned of the existence of additional Synaptics Touchpad
17 products, including the TM51, TM61, TM62 and possibly TM71 series (the “Additional Touchpad
18 Products”). DeBruine Decl., ¶ 11. Prior to that time, all of the information Synaptics had provided
19 implied that only the TM41 series could be at issue. DeBruine Decl., ¶¶ 3-5, 7. Despite its disclosure
20 obligations under Rule 26 and Rule 34, Synaptics purposefully withheld documents pertaining to these
21 Additional Touchpad Products, and only produced documents pertaining to the TM41 series. DeBruine
22 Decl., ¶ 5. Indeed, in its motion for summary judgment of non-infringement, Synaptics falsely implied
23 that the two versions of source code which Synaptics had produced, applied to the TM41 series. *See*
24 Synaptics’ MSJ Brief, at 3:14-7:23. Consequently, Elantech did not become aware of the Additional
25 Touchpad Products prior to the Synaptics deposition.

26 Elantech notified Synaptics of Elantech’s intent to amend its Final Infringement Contentions
27 accordingly. DeBruine Decl., ¶ 12. Elantech prepared a motion for leave to amend in June 2007, but
28 did not file this motion on the basis that Synaptics agreed not to oppose amended Final Infringement
Contentions identifying any products that incorporate the code that survived Elantech’s motion for

1 summary judgment – in other words, the Type 2 Enabled code. DeBruine Decl., ¶ 14. Now Synaptics
2 conveniently ignores that agreement, and asserts that any attempt by Elantech to amend now should be
3 denied for lack of diligence and good faith. Syn. Opp. at 2, n. 1. In fact if any party is not operating in
4 good faith, it is Synaptics. Synaptics points to no reason that it would renege on its earlier agreement,
5 nor why it would be prejudiced in any way for the Court to continue to address the same accused
6 products that Synaptics itself raised in its own motion.

8 **D. Elantech Has Shown Infringement In The United States**

9 Synaptics asserts that “Elantech presents no evidence of any sale by Synaptics of touchpads
10 containing Type 2 enabled code that constitute (sic) an infringement of United States patent rights.”
11 Syn. Opp. at 4:1-3. This argument lacks merit for at least the following two reasons: (1) Elantech has
12 previously presented evidence that it purchased infringing enabled touchpads; and (2) any failure by
13 Elantech to identify specific infringing sales is caused by Synaptics’ refusal to produce sales-related
14 documents on the alleged basis that they relate to damages and not liability.

15 Synaptics’ argument that Elantech presents no evidence of any sale by Synaptics of touchpads
16 containing Type 2 enabled code that constitutes an infringement of United States patent rights is simply
17 false. Elantech has previously presented evidence that it purchased at least one Synaptics touchpad
18 product with Type 2 enabled code. *See* SJ Order at 10:19-28 Synaptics is a company organized and
19 operating within the United States, and any sales, even if not technically consummated within the United
20 States, are recognized as sales in the United States for accounting purposes, and very likely resulted
21 from offers made or approved in the United States. Any failure by Elantech to identify specific
22 infringing sales is caused by Synaptics’ withholding of the documents and discovery related to such
23 sales as “damages” discovery. Synaptics has refused to produce sales-related documents on the alleged
24 basis that they relate to damages and not liability. Synaptics cannot in good faith argue that Elantech
25 cannot produce evidence of infringing sales when it is Synaptics that is withholding that information.

28 **III. CONCLUSION**

1 For the foregoing reasons, Elantech respectfully requests that the Court grants its motion for
2 partial summary judgment that Type 2 Enabled products infringe Claim 18 of the '352 patent.

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4 Dated: December 28, 2007

Respectfully submitted,

5 AKIN GUMP STRAUSS HAUER & FELD LLP

6 By: /s/ Sean P. DeBruine
7 Sean P. DeBruine

8 Attorneys for Plaintiff
9 ELANTECH DEVICES CORP.
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